STATE OF MICHIGAN

IN THE SUPREME COURT

SUE H. APSEY and ROBERT APSEY, JR.,

Plaintiffs-Appellees,

-vs-

THE MEMORIAL HOSPITAL, a Michigan Non-Profit Corporation d/b/a MEMORIAL HEALTHCARE CENTER

Defendant,

and

RUSSELL H. TOBE, D.O., JAMES H. DEERING, D.O., and JAMES H. DEERING, D.O., P.C., d/b/a SHIAWASSEE RADIOLOGY CONSULTANTS, P.C., Jointly and Severally,

Defendants-Appellants.
_____/

Supreme Court No. 129134

Court of Appeals No. 251110

Lower Court No. 01-007289-NH

129134

PLAINTIFF-APPELLEE'S RESPONSE TO APPLICATION FOR LEAVE TO APPEAL

CERTIFICATE OF SERVICE

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. SHOULD THIS COURT DECLINE THE DEFENDANTS' REQUEST TO GRANT LEAVE TO APPEAL SINCE THE COURT OF APPEALS DID NOT COMMIT ERROR IN CONCLUDING THAT PLAINTIFFS WOULD BE ALLOWED TO COMPLY WITH THE DICTATES OF MCL 600.2102 BY FILING AFFIDAVITS OF MERIT WHICH COMPLY WITH THAT STATUTE?

Plaintiffs-Appellees say "Yes".

Defendants-Appellants say "No".

COUNTER-STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

On November 7, 2001, Sue and Robert Apsey, Jr. filed this medical malpractice action in the Shiawassee County Circuit Court. Originally named as defendants in the case were The Memorial Hospital and Dr. Russell Tobe, a radiologist. With their Complaint, plaintiffs filed an Affidavit of Merit signed by Dr. Seth N. Glick. Attached hereto as Exhibit A is a copy of Dr. Glick's Affidavit of Merit. Dr. Glick is a radiologist licensed to practice medicine in the State of Pennsylvania. Dr. Glick's Affidavit was signed before Samaya Nicole Brown, a Notary public in Montgomery County Pennsylvania. Ms. Brown signed Dr. Glick's affidavit and she affixed a notarial seal to that document. Affidavit (Exhibit A), p. 3.

Plaintiffs later filed a First Amended Complaint adding as defendants a second radiologist, Dr. James H. Deering, and Dr. Deering's professional corporation. Plaintiffs' First Amended Complaint was accompanied by another affidavit signed by Dr. Glick. Attached hereto as Exhibit B is a copy of that affidavit. That second affidavit was notarized by a Pennsylvania notary public, Liza Nichols, and the document was stamped with Ms. Nichols' seal. Affidavit (Exhibit B), p. 4.

In June 2003, Dr. Deering and his corporation filed a motion for summary disposition. In that motion, they argued that the affidavit of merit filed with plaintiffs' First Amended Complaint was defective in that it did not contain a separate certification attesting to the fact that Liza Nichols, the person who notarized Dr. Glick's second affidavit was, in fact, a notary public.

In response to the defendants' motion, plaintiffs filed a certification specifying that Liza Nichols was an acting notary public in the State of Pennsylvania with the authority to administer oaths in that state. Attached hereto as Exhibit C is a copy of this certification.

The circuit court granted the defendants' motions for summary disposition and plaintiff appealed that decision to the Michigan Court of Appeals.

Following briefing and oral argument, a panel of the Court of Appeals issued its decision in this matter on April 19, 2005, affirming the grant of summary disposition to the defendants. *See* Defendants' Application Exhibit B.

Plaintiff filed a timely motion for reconsideration. On June 2, 2005, the Court of Appeals issued an Order vacating its April 19, 2005 Opinion.

On June 9, 2005, the Court of Appeals issued an Opinion on reconsideration. Defendants' Application Exhibit A. In that Opinion a two person majority of the Court of Appeals held that Dr. Glick's affidavit of merit did not comply with the requirements of MCL 600.2102.

Because of the "injustice and inequity that could result from our determination on this issue of first impression", the Court of Appeals' majority then turned to the question of whether its decision should be given full retrospective application. Opinion (Application Exhibit A), p. 7. Characterizing the underlying legal issues as "one of first impression whose resolution . . . was not clearly foreshadowed," the Court of Appeals' majority ruled:

> Apparently, there has been confusion in the legal community as to whether the more relaxed standards of the URAA applied. In light of the apparent reliance on the URAA by the legal community, we believe the justice requires a prospective application. *See Gladych, supra* at 606. Retroactive application would result in the dismissal of a large number of otherwise meritorious medical malpractice claims. Our Supreme Court has recognized that "resolution of the retrospective-prospective issue ultimately turns on considerations of fairness and public policy." *Riley v C & H Indus*, 431 Mich 632, 644-645; 433 NW2d 787 (1988). Fairness and public policy both support a prospective application because a serious injustice could

> result from a retroactive application, and prospective application of the ramifications for the failure to provide the MCL 600.2102(d) certification accomplishes a "maximum of justice" under the presented circumstances.

Id., pp. 7-8.

The Court of Appeals majority ruled that MCL 600.6102 would be strictly applied to any medical malpractice action filed after the date of its opinion on reconsideration. Opinion, p. 9. The majority further ruled that compliance with MCL 600.2102 would be required in pending cases as well. The panel held that plaintiffs in any pending cases in which the certification was not provided could come into compliance with the statute by filing a proper certification. Opinion, p. 9. The Court noted, however, that the plaintiffs herein had already filed a proper certification at the time that the summary disposition motions were under consideration. *See* Exhibit C. Because plaintiffs had already complied with the certification process outlined in the majority opinion, the Court of Appeals reversed the summary disposition entered in favor of the defendants and remanded the case to the circuit court for further proceedings. *Id.*

ARGUMENT

The defendants ask this Court to review that portion of the Court of Appeals June 9, 2005 decision limiting the application of its holding that a pending medical malpractice action was not automatically subject to dismissal if the affidavit of merit signed outside this state is not certified under MCL 600.2102. Analysis of the issue which the defendants raise necessarily depends on the underlying issue involved in this case, *i.e.* the dispute over whether MCL 600.2102 governs the validity of the affidavit filed in this case or whether that affidavit is to be judged on the basis of the Uniform Recognition of Acknowledgments Act, MCL 565.261, *et seq.* It is not particularly surprising that the defendants give little attention to the legal issue which divides the parties.

Contemporaneously with this response, plaintiffs are filing a cross-application for leave to appeal, requesting that the Court review the Court of Appeals majority's decision on the merits. The cross-application which plaintiffs are filing contains a detailed analysis of the legal issues involved in this case and the Court of Appeals' majority's complete mishandling of these issues. These arguments will not be repeated herein.

What the Court should be aware of is that for over one hundred years, Michigan has had a statute which specifically decrees that an affidavit signed in another state which is taken before a notary public who signs that document under seal does *not* require an additional certification. P.A. 1895, No, 185; MCL 565.261, *et seq.* Both of the statutes which the Michigan Legislature has passed on this subject have been statutes proposed by the Uniform Commissioners on State Laws. Both of these statutes have also expressly indicated that the forms of acknowledgment

being recognized in these uniform acts were designed to be *in addition to* any other forms of acknowledgment provided under the laws of this state. *See* MCL 565.268.

The Michigan Legislature most recently passed such a uniform act in 1969 when it adopted the Uniform Recognition of Acknowledgments Act (URAA). That act unequivocally provides that if an affidavit is signed in another state before a notary public, the signature of the notary and the notary's rank or title is sufficient proof of that person's authority to act and "*[f]urther proof of his authority is not required.*" MCL 565.263(1) (emphasis added).

The Court of Appeals majority in this case somehow found a way to write the uniform act which the Michigan Legislature passed in 1969 virtually out of existence. The majority held, instead, that another Michigan statute, MCL 600.2102, which does contain an additional requirement for the certification of the notary's authority, applies to any affidavit which is used in a judicial proceeding.

For the reasons which are addressed in plaintiffs' cross-application, this Court should review and reverse the Court of Appeals' decision concluding that the additional certification called for by MCL 600.2102 was required in this case. Correcting the obvious error in the Court of Appeals' decision in this case completely eliminates any need to review the issue which the defendants raise in their application. This brief will, however, address itself to the reasons why the defendants' application for leave should be denied.

I. THE COURT OF APPEALS MAJORITY OPINION IS NEITHER "PURELY PROSPECTIVE" NOR AN IMPROPER ADVISORY OPINION.

The principal theme of the defendants' application is that the Court of Appeals' majority's "purely prospective" application of its holding is contrary to Michigan law and, if

defendants are to be believed, in violation of the Michigan Constitution as an improper advisory opinion. Judging by the brief that the defendants have filed, they are apparently of the view that if they repeat this argument often enough, they can actually make it true.

Unfortunately for the defendants, the entire premise of this argument is wrong. The June 9, 2005 majority opinion is not a "purely prospective" ruling as defendants contend. The majority opinion expressly decreed that in every medical malpractice action filed after the release of that opinion, there would have to be strict compliance with the certification requirements of MCL 600.2102. Opinion (Application Exhibit A), p. 9. Had the majority opinion stopped at that point, the defendants might plausibly argue that the Court of Appeals' decision was "purely prospective." But, that is not what the majority held.

Instead, what the Court of Appeals held is that its ruling with respect to the certification requirements of MCL 600.2102 would apply to this case and *every other pending case*.[1] The Court of Appeals held that, "with regard to all malpractice cases pending where the plaintiffs are not in compliance with MCL 600.2102, on the basis of justice and equity, plaintiffs come into compliance by filing the proper certification." Opinion, p. 9. This requirement of retrospective compliance also applied to the case filed by Mr. and Mrs. Apsey. But, as the majority noted, the plaintiffs herein had already complied with the certification requirements of MCL 600.2102,

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[1]Notably, the Court of Appeals herein did *not* indicate that its decision would be applied only to pending cases *in which this certification issue has been raised* as this Court has done in several cases. *See e.g. Devillers v Auto Club Ins Ass'n*, 473 Mich 562; ___ NW2d ___ (2005); *Gladych v New Family Homes, Inc.*, 468 Mich 594, 607; 664 NW2d 705 (2003). Thus, in this respect, the Court of Appeals retrospective application of its holding is even greater than what this Court has done in the past.

when, following the filing of the defendants' motion for summary disposition, they filed a certification which complied with that statute. *See* Exhibit C.[2]

The Court of Appeals' decision in this case is as far removed from an advisory opinion as one can imagine. As a result of the Court of Appeals misinterpretation of the relevant statutes in this case, lawyers around this state have had to go through their files to determine whether affidavits obtained out-of-state comply with the requirements which the Court of Appeals has imposed herein. The plaintiffs in this case would have been in that same situation if they had not already complied with the dictates of the Court.

The foregoing analysis demonstrates rather dramatically that the defendants' entire argument as expressed in its application misses the point of the Court of Appeals' decision. The defendants argue that the Court of Appeals majority erred in refusing to give MCL 600.2102 retroactive effect. The defendants contend that the Court of Appeals "essentially pretended that MCL 600.2102, . . . did not exist prior to this decision." Defendants' Brief, p. 6. But, contrary to the assertions made by the defendants before this Court, *the Court of Appeals did give its (erroneous) interpretation of MCL 600.2102 retrospective effect.* It ruled that *every* pending medical malpractice case in which the certification requirement of MCL 600.2102 was applicable had to be brought into conformity with that statute.

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[2]The defendants assert in their brief that although the Court of Appeals "acknowledged the existence of MCL 600.2102's certification requirement and held that all parties would be bound by that statute in the future, ***the Court essentially negated the statute by refusing to apply it to the parties before this Court or to any other current litigants***." Defendants' Brief, p. 6 (emphasis added). This argument could prove persuasive only to one who fails to read the Court of Appeals' June 9, 2005 decision.

What the Court of Appeals' majority did in this case has nothing to do with the issue which the defendants invite this Court to review.[3] The Court of Appeals' majority did not declare that MCL 600.2102 would apply prospectively only. What the Court of Appeals did, instead, was to determine that, in the interests of justice and fairness, all pending cases in which the certification was required would be allowed to come into compliance with the certification requirements of that statute without being subject to dismissal on limitation's grounds. However, that is not what the defendants challenge in this application.

What the Court of Appeals did in this case is comparable to the actions of this Court in *Bryant v Oakpointe Villa Nursing Center, Inc.*, 471 Mich 411; 684 NW2ds 864 (2004), a case which was cited at length in the Court of Appeals' decision. Opinion (Application Exhibit A), p. 8. In that case, this Court had to decide whether the plaintiff's claims were premised on medical malpractice or ordinary negligence. The distinction between the two was particularly important in *Bryant* because if any part of the plaintiff's cause of action was found to be based on medical malpractice, that claim would be barred by the statute of limitations.

This Court ruled in *Bryant* that some of the plaintiff's claims were properly characterized as medical malpractice. The Court acknowledged that this determination had the effect of subjecting these claims to dismissal on limitations grounds. Nevertheless, this Court ruled in *Bryant* that the equities of the case required a different result. In *Bryant*, the Court ruled that it would not allow a limitations defense to be interposed where "plaintiff's failure to comply with

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[3]This fact is of more than passing interest since this Court normally confines the scope of its review to the issues actually raised in an application for leave to appeal.

the applicable statute of limitations is the product of an understandable confusion about the legal notice of her claim, rather than a negligent failure to preserve her rights." 471 Mich at 432.

The Court of Appeals' decision in this case is comparable to *Bryant*. The defendants do not challenge this in their application. Instead, the defendants chose only to apply for leave from a decision which the Court of Appeals did *not* make.

II. THE RETROACTIVITY QUESTION.

As explained in the prior section of this brief, the Court of Appeals did *not* rule that MCL 600.2102's certification requirement was to be applied prospectively only. However, since the defendants have chosen to challenge this aspect of the case, plaintiffs will briefly address why the Court of Appeals *should have* limited its decision in this case to future cases.

It is true that judicial decisions are generally given full retroactive effect. *Michigan Educational Employment Mutual Insurance Co v Morris*, 460 Mich 180, 189; 596 NW2d 142 (1999). However, the Court has recognized that prospective application of a holding is appropriate where a decision overrules settled precedent or where a court decides an "issue of first impression whose resolution was not clearly foreshadowed." *Lindsey v Harper Hospital*, 455 Mich 56, 68; 564 NW2d 861 (1997); *People v Phillips*, 416 Mich 63, 68; 330 NW2d 366 (1982).

This case fits squarely within the rule of prospectivity expressed in *Lindsey*. The defendants in this case raised the novel issue that a statute requiring the certification of a notary's authority, which has been in existence since 1879, somehow trumped a uniform act adopted by the Michigan Legislature in 1969. In arriving at this conclusion the Court of Appeals overlooked two decisions of this Court, *Reid v Rylander*, 270 Mich 263; 258 NW2d 630 (1939) and *Sipes v*

McGhee, 316 Mich 614; 25 NW2d 638 (1947), which had held under an earlier uniform act adopted by the Michigan Legislature that certification of the notary's authority was not necessary. The Court of Appeals also overlooked the express statement in MCL 535.268 that the URAA was designed to provide a method for the recognition of affidavits signed outside the State of Michigan which was *in addition to* any other provided in another Michigan statute.

The fundamental errors in the Court of Appeals' decision in this case are discussed at length in plaintiffs' cross-application. Suffice it to say that nothing in Michigan law foreshadowed the Court of Appeals' conclusion in this case that MCL 600.2102 would effectively obliterate the URAA.

III. THE DEFENDANTS' "JURISDICTION" ISSUE.

Finally, the defendants attack the Court of Appeals' decision by suggesting that neither the circuit court nor the Court of Appeals had jurisdiction over this case. The defendant contends that these courts were powerless to make any ruling in this case once it determined that appellees failed to file an affidavit of merit which fully complied with MCL 600.2912d.[4] In other words, what the defendants contend is that the failure to file an affidavit which fully complies with the dictates of MCL 600.2912d divests a circuit court of jurisdiction.

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[4]The precise argument which defendants make is that plaintiff "failed to 'commence' this medical malpractice action under *Scarsella v Pollak*, 461 Mich 547, 552-553; 607 NW2d 711 (2000)." Application Brief, p. 19. Plaintiffs would vigorously dispute that this Court's decision in *Scarsella* dictates the conclusion that this matter was never "commenced." In actuality, this Court in *Scarsella* found that a medical malpractice complaint which was submitted *without* an affidavit was the functional equivalent of a case which was not filed. But, this Court in *Scarsella* explicitly indicated that this holding was *not* applicable to a situation in which an affidavit of merit was timely filed, but that affidavit was later deemed inadequate or defective. The application of *Scarsella* to these facts is addressed in the final issue of plaintiffs' cross-application for leave to appeal.

The defendants' conception of jurisdiction is completely wrong. As this Court has recognized, the jurisdiction of a court is not predicated on the question of whether a particular case has procedural defects or substantive merit. *See Travelers Ins Co v Detroit Edison Co*, 465 Mich 185; 204; 631 NW2d 7334 (2001) ("subject matter jurisdiction . . . is not dependent on the particular facts of the case".); *Campbell v St. John Hospital*, 434 Mich 608, 613-614; 455 NW2d 695 (1990). Rather, as this Court explained in *Bowie v Arder*, 441 Mich 23; 490 NW2d 568 (1992):

> "[J]urisdiction over the subject matter is the right of the court to exercise judicial power over that class of cases; not the particular case before it, but rather the abstract power to try a case of the kind or character of the one pending; and not whether the particular case is one that presents a cause of action, or under the particular facts is triable before the court in which it is pending, because of some inherent facts which exist and may be developed during the trial."
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> *Id* at 39, *citing Joy v Two-Bit Corp*, 287 Mich 244, 253-254; 283 NW2d 45 (1938).[5]

Thus, in assessing whether the circuit court had jurisdiction over the course of action filed by Mr. and Mrs. Apsey, a court must determine whether it has jurisdiction over the class of cases in which medical malpractice is claimed. Here, there can be no doubt that under the applicable constitutional and statutory provisions, Const 1963, art 6, §13; MCL 600.601 and MCL 600.605,

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[5]This Court's decision in *Bowie* directly refutes the argument which defendants raise based on a case from the Indiana Court of Appeals, *Browning v Walters*, 620 NE2d 28 (Ind App 1993). Application Brief, p. 21. That case held that one element of a court's jurisdiction is "jurisdiction of the particular case" a theory which defendants urge this Court to adopt. While this concept of jurisdiction may exist in Indiana, it certainly does not exist here since jurisdiction under Michigan law does not encompass a court's authority to decide the particular case before it. *Bower*, 441 Mich at 39.

the circuit court had jurisdiction to entertain a claim based on medical malpractice. *Cf Neal v Oakwood Hospital Corp*, 226 Mich 701, 707-708; 575 NW2d 68 (1997).

The defendant's jurisdictional argument is completely meritless.

RELIEF REQUESTED

Based on the foregoing, plaintiffs-appellees, Sue H. Apsey and Robert Apsey, respectfully request that the Court deny the defendants' application for leave to appeal in its entirety.

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